

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

JONATHAN MONSARRAT,

Plaintiff,

v.

BRIAN ZAIGER dba
ENCYCLOPEDIADRAMATICA.SE,

Defendant.

CIVIL ACTION NO. 17-cv-10356-PBS

**PLAINTIFF'S MEMORANDUM IN SUPPORT OF HIS MOTION TO AMEND
COMPLAINT**

The plaintiff Jonathan Monsarrat files this Memorandum in Support of his Rule 15(a)(2) Motion to Amend seeking leave to file an Amended Complaint in which the Doe defendants are deleted and Defendant Brian Zaiger is sued as the owner/operator of the website Encyclopedia Dramatica.

I. BACKGROUND AND RELEVANT PROCEDURAL HISTORY.

In his Verified Complaint, ECF # 1, Jonathan Monsarrat sued Doe Defendants 1-5 as the owners and/or operators of the Encyclopedia Dramatica website for secondary copyright infringement. Brian Zaiger was named as a defendant as the administrator of the website.

Pursuant to leave of Court, service of the summons and complaint was made on the Doe defendant owners. ECF #13. On April 26, 2017, the defendant Zaiger was served with the summons and complaint. ECF # 14.

On May 26, 2017, the defendant Zaiger filed his answer, affirmative defenses and counterclaim. ECF# 24. On June 13, 2017, the plaintiff filed his answer and affirmative defenses to Zaiger's counterclaim. ECF# 31.

The Court scheduled its initial LR 16.1 conference for July 18, 2017. ECF# 30. On July 11, 2017, the parties filed separate LR 16.1(D) statements. See plaintiff, ECF# 33, and defendant, ECF# 38. Of relevance, the plaintiff proposed a deadline to amend pleadings and join parties for late fall 2017 following a mediation; and the defendant proposed a deadline of July 14, 2017.

On July 18, 2017, the parties appeared at the Scheduling conference. The plaintiff proposed a mediation stating that Zaiger had admitted he is the owner of the website and that the offending page had been taken down. See ECF # 41 at 4. But the defendant declined to participate in mediation stating he had no interest in settling, "without reimbursement of our [legal] fees." *Id.* at 5-8. Whereupon the Court entered a scheduling order setting deadlines for discovery and anticipated motion(s) for summary judgment but did not set a deadline to amend pleadings and join parties. ECF # 39.

II. CLAIMS AGAINST ZAIGER

The proposed amended complaint deletes the Doe defendants and sues Zaiger as the owner/operator of the Encyclopedia Dramatica website for both direct and secondary infringement and focuses on the Encyclopedia Dramatica website's use of an unauthorized alteration of Jonathan Monsarrat's copyrighted June 2000 MIT mascot photograph. Specifically the proposed amended complaint alleges that Zaiger has used Plaintiff's copyrighted June 2000

MIT mascot photograph that had been altered to maliciously and falsely label him as a pedophile who preys on underage girls for commercial purposes including without limitation to sell advertising space to a porn site, F—ckbook.com™, featuring images that are, or appear to be, of minors engaging in sexually explicit conduct.

Exhibits C and D to the proposed amended complaint are copies of the page published on the Encyclopedia Dramatica website explicitly referencing pedophilia-- including internet shorthand terms Pedo and Pedobear-- and at the bottom of the page is an advertisement for the porn site, F—ckbook.com.™ The advertisement features images that are, or appear to be, of minors engaging in sexually explicit conduct. To avoid publishing in the public record what may well constitute child pornography, See *U.S. v Williams*, 553 US 285, 294-95 (2008), plaintiff will separately move to file Exhibits C and D to the proposed amended complaint under seal.

III. RULE 15(a)¹ FACTORS.

The standard for the Court's exercise of its discretion is a longstanding one.

"Rule 15(a) declares that leave to amend 'shall be freely given when justice so requires'; this mandate is to be heeded. See generally, 3 Moore, Federal Practice (2d ed. 1948), 15.08, 15.10. If the underlying facts or circumstances relied upon by a plaintiff may be a proper subject of relief, he ought to be afforded an opportunity to test his claim on the merits. In the absence of any apparent or declared reason—such as undue delay, bad faith or dilatory motive on the part of the movant, repeated failure to cure deficiencies by amendments previously allowed, undue prejudice to the opposing party by virtue of

¹ (a) AMENDMENTS BEFORE TRIAL.

... (2) *Other Amendments*. In all other cases, a party may amend its pleading only with the opposing party's written consent or the court's leave. The court should freely give leave when justice so requires.

...

allowance of the amendment, futility of amendment, etc.—the leave sought should, as the rules require, be 'freely given.'"

Foman v. Davis, 371 U.S. 178, 182 (1962); *Alharbi v. Beck*, 103 F. Supp. 3d 166, 167–68 (D. Mass. 2015).

The motion is timely and has been promptly made. The case is in its early stages. There has been no undue delay and grant of leave will cause no prejudice.

IV. CONCLUSION.

WHEREFORE the plaintiff Jonathan Monsarrat asks the Court to grant him leave to amend and to file and serve the proposed Amended Complaint attached as Exhibit A to his motion.

October 18, 2017

Respectfully submitted,

JONATHAN MONSARRAT,
Plaintiff,

By his attorneys,

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CERTIFICATE OF SERVICE

I hereby certify that this document filed through the ECF system will be sent electronically to the registered participants as identified on the Notice of Electronic Filing (NEF), on October 18, 2017.

/s/ Richard A. Goren